REMARKS

In the Office Action dated October 3, 2007, the Examiner has set forth a requirement for restriction under 35 U.S.C. §121, alleging that the subject matter defined by the claims of the present invention represents sixteen (16) separate and distinct inventions. Groups I-VI, as defined by the Examiner, are reproduced herein below:

Group I. Claims 1-6, 8-13, 15-23 and 25-26, drawn to an isolated nucleic acid molecule comprising SEQ ID NO: 1, a genetic construct, a vector, a host cell, and a plant cell, classified in class 536, subclass 23.6, for example.

Group II. Claims 1-5, 7-12, 14-22 and 24-26, drawn to an isolated nucleic acid molecule comprising SEQ ID NO: 3, a genetic construct, a vector, a host cell, and a plant cell, classified in class 435, subclass 320.1, for example.

Group III. Claims 27-31 and 33, drawn to an isolated polypeptide encoded by SEQ ID NO: 1, classified in class 530, subclass 370, for example.

Group IV. Claims 27-30 and 32-33, drawn to an isolated polypeptide encoded by SEQ ID NO: 3, classified in class 530, subclass 370, for example.

Group V. Claims 34-37 and 39-42, drawn to a method comprising introducing into a cell or tissue an expression vector an isolated nucleic acid molecule comprising SEQ ID NO: 1, classified in class 435, subclass 468, for example.

Group VI. Claims 34-36, 38-41 and 43, drawn to a method comprising introducing into a cell or tissue an expression vector an isolated nucleic acid molecule comprising SEQ ID NO: 3, classified in class 435, subclass 471, for example.

In order to be fully responsive to the Examiner's requirement for restriction, Applicants provisionally elect to prosecute the subject matter of Group I, Claims 1-6, 8-13, 15-23 and 25-26, drawn to an isolated nucleic acid molecule comprising SEQ ID NO: 1, a genetic construct, a vector, a host cell, and a plant cell. Applicants reserve the right to file one or more

divisional applications directed to the non-elected subject matter in this application in the event that the pending Restriction Requirement is made final.

However, pursuant to 37 C.F.R. §§ 1.111 and 1.143, Applicants hereby traverse the Examiner's requirement for restriction and request reconsideration thereof in view of the following remarks.

An Examiner's authority to require restriction is defined and limited by statute:

> If two or more independent and distinct inventions are claimed in one application, the Commissioner may require the application to be restricted to one of the inventions.

35 U.S.C. § 121, first sentence (emphasis added). The implementing regulations of the Patent and Trademark Office include the mandate that restriction is appropriate only in cases presenting inventions which are both independent and distinct, 37 C.F.R. §§1.141-142. Without a showing of independence and distinctness, a restriction requirement is unauthorized. In the present application, the claims which the Examiner has grouped separately are not "independent and distinct" so as to justify the restriction requirement.

In the first instance, the Examiner contends that the isolated nucleic acid molecules of Groups I-II are distinct from each other because they comprise structurally distinct nucleotide sequences.

Applicants respectfully disagree. SEQ ID NO: 1 of Group I is a part of SEQ ID NO: 3 of Group II. Both SEQ ID NO: 1 and SEQ ID NO: 3 encode the same protein, OPEm1. Although the specification describes that SEQ ID NO: 1 and SEQ ID NO: 3 encode the proteins of SEQ ID NO: 2 and SEQ ID NO: 4, respectively, SEQ ID NO: 2 and SEQ ID NO: 4 are in fact identical and represent the same amino acid sequence. SEQ ID NO: 1 represents the nucleotide coding sequence, whereas SEQ ID NO: 3 includes additional 5' and 3' untranslated sequences.

See page 4, lines 12-21 of the specification. Therefore, Applicants respectfully submit that the nucleic acid molecules of Group I and Group II are clearly not "independent and distinct" from each other. Further, examination and search of both Groups I and II will not impose additional burden on the Examiner.

Similarly, the polypeptide of SEQ ID NO: 3 (Group III) and the polypeptide of SEQ ID NO: 4 (Group IV) are identical, and therefore do not represent patentably distinct inventions. Applicants further respectfully submit that this polypeptide is encoded by, and can be produced by employing, the nucleic acid molecules of Group I and Group II. Additionally, the methods of introducing into a cell or tissue an expression vector comprising SEQ ID NO: 1 or SEQ ID NO: 3, designated by the Examiner as Groups V and VI, are intended for the expression of the encoded polypeptide of Groups III and IV.

Therefore, Applicants respectfully submit that the sixteen groups defined by the Examiner all relate to the structure and use of the OPEm1 molecule, including the OPEm1 nucleic acids, the OPEm1 polypeptide, antibodies directed to the OPEm1 polypeptide, and the related methods. That is, Groups I-XVI are all different aspects of a single invention.

The courts have recognized that it is in the public interest to permit applicants to claim several aspects of their invention together in one application, as the applicants have done herein. The CCPA has observed:

> We believe the constitutional purpose of the patent system is promoted by encouraging applicants to claim, and therefore to describe in the manner required by 35 U.S.C. §112 all aspects as to what they regard as their invention, regardless of the number of statutory classes involved.

In re Kuehl, 456 F.2d 658, 666, 117 U.S.P.Q. 250, 256 (CCPA 1973). This interest is consistent with the practical reality that a sufficiently detailed disclosure supporting claims to one aspect of

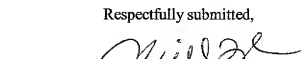
an invention customarily is sufficient to support claims in the same application to other aspects of the invention.

Further, Applicants recognize that the Examiner has required restriction between product and process claims. For example, the Examiner has admitted that Groups I-II and Groups V-VI are related as product and process of use, and that Groups I-II and Groups VIII-IX are also related as product and process of use. Applicants have elected Group I (product) by way of the instant Response. The Examiner is reminded of the rejoinder practice; namely, when a product claim is subsequently found allowable, withdrawn process claims that depend from or otherwise include all the limitations of the allowable product claim will be rejoined. MPEP 821.04 and 37 C.F.R. §1.104.

Finally, Applicants respectfully submit that a determination to make the pending restriction requirement final must evidence the patentable distinctness of all defined sixteen groups, one from the other, as presented by the Examiner.

In view of the foregoing comments, it is respectfully urged that the Examiner reconsider and withdraw the requirement for restriction and provide an action on the merits with respect to all the claims, or at least the claims of both Group I and Group II.

Respectfully submitted,



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